

**UNITED STATES OF AMERICA  
THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
BEFORE THE HONORABLE JUDGE ANDREW GOLLIN**

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STEIN, INC.

*Respondent; and*

Case No. 09-CA-214633

Case No. 09-CA-215131

Case No. 09-CA-219834

INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL 18

*Respondent; and*

Case No. 09-CB-214595

Case No. 09-CB-215147

TRUCK DRIVERS, CHAUFFEURS AND HELPERS  
LOCAL UNION NO. 100, AFFILIATED WITH THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

*Charging Party; and*

LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 534

*Charging Party.*

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**RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL  
18'S POST-HEARING BRIEF**

Respectfully Submitted,

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## **I. Introduction**

Long ago, a concurring judge on the Court of Appeals for the District of Columbia Circuit lamented that the “subject of successorship” in the context of federal labor law “is shrouded in somewhat impressionist approaches[.]” *Machinists Dist. Lodge 94 v. NLRB*, 414 F.2d 1135, 1139 (D.C. Cir. 1969) (Leventhal, J., concurring). Thankfully, as it often does, the Supreme Court of the United States alleviated this murkiness in the form of *NLRB v. Burns Security Servs.*, 406 U.S. 272 (1972) (“*Burns*”). From this decision, the National Labor Relations Board (“Board”) has developed a robust and consistent body of jurisprudence concerning a successor’s obligations in the context of the National Labor Relations Act (“Act”). In the instant matter, Region 9 of the Board issued a Complaint against Respondents Stein, Inc. (“Stein”) and the International Union of Operating Engineers, Local 18 (“Local 18” or “Union”). However, the entirety of the Region’s allegations against both Respondents lives or dies with the finding – one of both fact and law – that Stein is a successor as dictated by *Burns* and thus retains certain bargaining obligations towards the Charging Parties Teamsters Local 100 and Laborers’ Local 534. Board precedent, as developed in the decades after *Burns*, mandates the conclusion that Stein is not a *Burns* successor. Accordingly, Local 18’s conduct in this matter did not violate Sections 8(b)(1)(A) and 8(b)(2), and the Union respectfully requests that the Complaint be dismissed in its entirety.

## **II. Statement of Facts**

### **A. International Union of Operating Engineers, Local 18**

For over 70 years, Local 18 has represented the interests of operating engineers working in 85 of Ohio’s 88 counties, along with four counties in Northern Kentucky. (*About Us*, <http://www.oe18.org/about-us/>, accessed Dec. 18, 2018.)<sup>1</sup> As the name implies, operating

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<sup>1</sup> It is appropriate for the ALJ to “take[] judicial notice of [a] Respondent’s administrative structure as set forth on its website” because “a court may take judicial notice of information publicly announced on a party’s website, as long

engineers are the men and women responsible for, *inter alia*, operating the equipment, machinery, and technology utilized in all aspects of the construction industry and heavy industrial maintenance and service industries. (*Id.*) In furtherance of its representational duties, Local 18 negotiates and administers a plethora of collective-bargaining agreements (“CBAs”) covering a wide variety of different industries. (TR 682.) Local 18 also maintains a Union hiring hall through which operating engineers are referred to employment with employers performing work under many of the Union’s CBAs. Headquartered in Cleveland, Ohio, Local 18 maintains five district offices located in the Ohio cities of Cleveland, Toledo, Akron, Columbus, and Middletown. (*District Offices*, <http://www.oe18.org/about/district-offices/>, accessed Dec. 18, 2018.)

#### B. AK Steel’s Middletown Facility

AK Steel Holding Corporation (“AK Steel”) is a steel-making company headquartered in Westchester Township, Ohio. AK Steel owns and operates eight steel-making plants, including a plant located in Middletown, Ohio (“Middletown Facility”). (Jt. Exh. 1, ¶ 5.) The steel-making process at the Middletown Facility produces a molten byproduct known as slag. (TR 74, 102.) At the Facility, slag is deposited into troughs or pits that are dug into the ground by employees operating excavators. (TR 1336-37.) Once cooled in the pit, the slag is collected by an employee utilizing a loader and placed into a haul truck<sup>2</sup>, which transports the slag to a stockpiling area. (TR 135-36, 1336-37.) At the stockpiling area, an employee operating a loader places the slag into a haul truck, which then delivers it to a processing plant where the slag is removed from the truck via loader and placed onto a conveyer belt. (TR 76, 135-37, 1337-39.) The slag is subsequently

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as the website’s authenticity is not in dispute and it’s capable of accurate and ready determination.”” *United States Postal Serv.*, 365 NLRB No. 92 (2017), slip op. at 3, quoting *Doron Precision Sys., Inc. v. FAAC, Inc.*, 423 F.Supp.2d 173, 179, fn. 8 (S.D.N.Y. 2006).

<sup>2</sup> Euclid, Terex, and Hitachi are brands of haul trucks utilized for transporting slag at the Middletown site. (TR 79, 238, 531.)

fed into a crusher and then a shaker, after which it is separated by screens into different sized aggregate. (TR 76-77.) This aggregate is stored in designated stockpile areas depending on its grade. (TR 237-38.) The resulting aggregate is used by customers for a variety of road construction projects. (TR 76-77, 212.)

For decades, AK Steel has subcontracted all of its slag reclamation work at the Middletown Facility to third-party slag reclamation service providers. To this end, AK Steel will periodically submit its slag reclamation work to a competitive bidding process, awarding the lowest bidder a contract to perform slag reclamation. (TR 767-68.) Like most segments of our capitalistic economy, the third-party slag reclamation business is highly competitive with opposing companies often bidding on the same job. (TR 109, 768-771.) As a result, it is not uncommon for a steel manufacturer, such as AK Steel, to switch slag contractors.

Over the past century, a variety of entities have performed slag reclamation and processing at the Middletown Facility. In chronological order, they include McGraw Construction Co., International Mill Services, Inc., Tube City Inc. d/b/a/ Olympic Mill Service, Tube City LLC d/b/a IMS Division Tube City IMS, Tube City LLC, Tube City IMS, LLC, and TMS. (Jt. Exh. 1, ¶ 7.) In each instance, the change in slag contractors was occasioned as a result of AK Steel opening the slag contract to competitive bidding or the merger of two or more companies performing slag reclamation work. (TR 184, 767-771; Jt. Exh. 1, ¶ 14.)

### C. TMS International, LLC

TMS International, LLC (“TMS”) provides various services to the steel industry, including slag processing, metal recovery, surface conditioning, logistics, and scrap purchasing for the steel-making industry. (Jt. Exh. 1, ¶ 6.) For over a decade, TMS was responsible for performing slag reclamation and processing for AK Steel at the Middletown Facility. (TR 74, 212-13, 234, 507.)

In furtherance of its slag reclamation work at the Middletown Facility, TMS maintained no fewer than three separate CBAs with three separate unions. The truck drivers that transported slag by haul truck to the processing area were represented by Charging Party Teamsters Local 100. (TR 78-79, 110-11, 277-80, 790.) Laborers that were responsible for site safety, site cleaning, and lancing were represented by Charging Party Laborers' Local 534. (TR 82-86, 112-13, 115-17, 126, 242-43, 246-47, 285-86.) Finally, operating engineers responsible for operating heavy equipment (such as loaders, forklifts, backhoes, skid-steers, portable screening plants, conveyors, Liebherr scrap handlers, telehandlers, fuel/lube trucks, cable cranes, and backhoes), operating slag processing plants, and maintaining all heavy and transportation equipment were represented by Local 18. (TR 82-86, 112-13, 115-17, 126, 242-43, 246-47, 285-86, 774-89, 793-93.)<sup>3</sup> Although TMS's CBA with Laborers' Local 534 was initially due to expire August 31, 2016 (Jt. Exh. 6, Art. XXII), it was extended by parties until December 31, 2017 (Jt. Exh. 11.) TMS's CBA with Teamsters Local 100 was also due to expire on December 31, 2017 (Jt. Exh. 7, Art. 21.) Conversely, Local 18's agreement with TMS/Tube City IMS was not set to expire until September 30, 2018 (Jt. Exh. 8, Sec. 25.1).

Throughout the course of TMS's tenure as a slag processor at the Middletown Facility, there was no functional integration between the three trades. That is, the operation of heavy equipment for the purposes of digging pits and loading slag onto haul trucks and conveyer belts, heavy equipment maintenance, and operation of slag processing plants were only performed by operating engineers (TR 247-49, 774-89, 792-93, 831-41, 920-21, 932-40; 1030-36, 1089-94, 1147-52; Emp. Exh. 17-24, 26), the operation of haul trucks and water trucks was only performed

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<sup>3</sup> Portable screening plants sort slag byproduct by size in order to create different sizes of slag aggregate. (TR 776.) Liebherrs process scrap material (TR 780-81) and lube trucks provide fuel and hydraulic services to heavy equipment. (TR 792.)

by teamsters. (TR 794-95, 937-40, 1024, 1093-94, 1152-53; Emp. Exhs. 25, 27), and only laborers performed site safety and general clean-up duty. (TR 84, 127-28, 423-24, 511-13.) At no point were these employees ever cross-trained on the other crafts' respective duties. (TR 116-17, 126-27, 129-30, 283-84.) In effect, TMS structured its operations in such a way that three different crafts performing slag reclamation work were Balkanized into separate entities that were each responsible for, and defended, the discrete tasks covered by their respective CBAs.

In addition to maintaining its CBA with Local 18 covering slag operations, TMS was also a party to two separate CBAs with Local 18 covering different types of work at the Middletown Facility. The first of these agreements is known as the "Green Coil CBA" and it covers work TMS performed on new steel products manufactured at the Middletown Facility. (TR 324-25.) The second agreement covers scrap metal processing work TMS performs for AK Steel and is known as the "Scarfig CBA." (TR 800-01.) The work and the employees covered by the Scarfig CBA and the Green Coil CBA are separate and distinct from the work and employees covered by the slag reclamation CBA.

#### D. Bargaining and representational history at the Middletown Facility

Local 18's history in the slag reclamation process at the Middletown Facility stretches back decades. (TR 688-90.) Indeed, Local 18's presence at the Middletown Facility spans such a long period of time that no single person was able to definitively state when Local 18 first negotiated a CBA covering slag work at the Middletown Facility. By some estimates, because the very first union contractor that performed slag work at the Middletown facility – McGraw Construction – was engaged in the construction industry, the prevailing wisdom within Local 18 was that the first series of CBAs covering slag work at the Middletown Facility might have been a Section 8(f) pre-hire agreement. *See Ohio Valley Carpenters Dist. Council*, 131 NLRB 854, 856 (1961) ("McGraw

is an Ohio corporation with its principal place of business in Middletown, Ohio, engaged in the building and construction business, including work performed by it in constructing additions to the steel mills of the Armco Corporation, hereinafter called Armco, in Middletown, Ohio”). In any event, while the genesis of Local 18’s first CBA covering slag work at the Middletown Facility may be a mystery, more recent events surrounding the nature of Local 18’s representational status for employees performing slag reclamation work at the Middletown Facility are not. Indeed, it is abundantly clear that in 1999, Local 18 approached the contractor then performing slag reclamation work at Middletown Facility – Tube City, Inc. d/b/a, Olympic Mill Services<sup>4</sup> – and presented signed authorization cards demonstrating that a majority of the “operators” performing that work wished to designate Local 18 as their bargaining representative. (TR 692-94; L18 Exh. 1.) It is also equally clear that in response to that demand, Olympic Mill Services reviewed the cards, determined that Local 18 did, in fact, represent a majority of its employees, and agreed to so recognize Local 18 as the duly authorized bargaining representative for those employees. (*Id.*) From that point forward, Local 18 has continued to negotiate a series of CBAs covering operating engineers engaged in slag reclamation work at the Middletown Facility. (TR 688-89.)

Unlike Local 18, the General Counsel and the Charging Parties failed to adduce any evidence that their representation status was achieved as a result of demonstrating majority support within the respective bargaining units. (TR 109, 272, 362, 489, 563-64, 764-65, 1179). Instead, the General Counsel admitted that it did not possess any records indicating that the Charging Parties were certified as a representative under Section 9(a) of the Act. (TR 70.)<sup>5</sup> For their part,

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<sup>4</sup> Tube City, Inc. d/b/a, Olympic Mill Services would later merge with International Mill Services Tube City to form Tube City IMs which would later become TMS.

<sup>5</sup> ALJ: So your argument is that there’s been no conversion or a creation of a 9(a) relationship based on language in a collective bargaining agreement? Your argument [is] it’s not 8(f), and it therefore has to be 9(a), because these entities are not engaged in construction at this particular job site?

Mr. Goode [Counsel for the General Counsel]: Correct, yes, Your Honor.

the Charging Parties acknowledged that they did not possess any documentation or language in a CBA that would indicate that they were, at any time, recognized under Section 9(a) of the Act as a bargaining representative as a result of demonstrating majority support within the unit. (Jt. Exhs. 23-24; TR 36-38, 495-96.) Simply put, both the General Counsel and the Charging Parties failed to present any evidence to establish that either or both of the Charging Parties were, at any time, Section 9(a) representatives – by virtue of Board-certified election or voluntary recognition – for any employees working at the Middletown Facility. (TR 109, 271-72, 362-63, 500, 564, 764, 1179.) Rather, the CBAs in place between the Charging Parties and TMS bore all the hallmarks of 8(f) agreements; *to wit*; both CBAs have long contained exclusive hiring hall provisions applied to the slag reclamation/metal recovery services at the Middletown Facility. (TR 352-353, 468, 803, 822-823, 928, 996, 1053, 1055, 1088-1089, 1142-1144.)

E. Stein, Inc.

Stein offers various services to companies engaged in the steel-making process, including slag reclamation work. (Jt. Exh. 1, ¶ 1; TR 230.) As such, Stein is a competitor to TMS in an industry that is, by any measure, highly competitive. (TR 1193-94.) Unlike TMS, Stein does not maintain contracts with the Teamsters or the Laborers and, therefore, does not have a highly Balkanized workforce with specific tasks assigned to specific employees within specific bargaining units. Rather, Stein's business model uses one bargaining unit and one bargaining unit only to perform all facets of its slag reclamation work. (TR 773, 1188-1192.) For decades, Local 18 has been the duly authorized collective bargaining agent for Stein employees working in slag reclamation at steel mills across the state of Ohio. (TR 1190-93.) Local 18 and Stein have for years been party to a CBA that covers Stein's slag reclamation work performed in all of the Ohio counties covered by Local 18's geographical jurisdiction.

As a result of this single bargaining unit approach, Stein's slag reclamation business is built upon the expectation that the work performed by employees is not dictated by their respective bargaining unit. Rather, based upon the needs of the business, each employee is expected to perform whatever task is necessary to get the job done. In this manner, Local 18 members employed by Stein are responsible for not only operating the heavy equipment used in the slag reclamation process, but also drive the haul trucks and perform safety site inspections.

F. Stein's winning bid for slag reclamation work at the Middletown Facility

In the summer of 2017, AK Steel opened up its subcontract for scrap reclamation and processing at the Middletown Facility to competitive bidding. (Jt. Exh. 1, ¶ 14.) At that time, TMS was performing this work, utilizing employees represented by Local 18, Teamsters Local 100, and Laborers' Local 534. (*Id.*) TMS's slag processing operations employed 15 individuals represented by Teamsters Local 100, 14 individuals represented by Laborers' Local 534, and 42 individuals represented by Local 18. (Jt. Exh. 1, ¶¶ 17-19.) Stein ultimately submitted what became the winning bid (TR 184), and on October 27, 2017, entered into an agreement with AK Steel to perform scrap reclamation, slag removal, and slag processing at the Middletown Facility. (Jt. Exh. 1, ¶ 14.)

In preparing its winning bid for the slag work at the Middletown Facility, Stein was planning on using its established business model; namely, one bargaining unit to perform all the slag work. (TR 185-188.) Stein further anticipated that, in accordance with its other slag operations in Ohio, it would probably employ a majority of employees that were primarily assigned to equipment traditionally operated by Local 18 members. (*Id.*)

After Stein won the bid, Doug Huffnagel, Stein's area manager (TR 210-11, 1187-89), visited the Middletown Facility where he set up camp at an on-site office to observe how TMS

operated the slag reclamation and processing work. (TR 1193.) Through his observations, Mr. Huffnagel noticed how TMS oftentimes utilized two or three employees to perform a job that could be satisfactorily performed by one individual. (TR 1193-94.) Mr. Huffnagel also saw an inordinate amount of idling and certain tasks not being completely in a timely fashion. (*Id.*) Aside from these operational issues, Mr. Huffnagel was also visiting the Middletown Facility to observe how TMS employees were performing their respective jobs as a way to aid his individual assessments in the event that any of them chose to apply for work at Stein. (TR 1995.)

Meanwhile, David Holvey, Stein's Vice President and Chief Financial Officer (TR 183), reviewed TMS's seniority list which demonstrated that the majority of TMS employees were represented by Local 18. (TR 184.) Mr. Holvey then contacted Local 18 for the purpose of exploring whether it was appropriate to have a single union – Local 18 – represent the entire complement of employees at the Middletown Facility. (TR 184-85, 187-89; GC Exh. 4.) Stein pursued this route of inquiry because of its established practice of utilizing a single bargaining unit represented by Local 18 for all of its slag processing sites (TR 186, 1190-92), and Local 18's status as the representative of a majority of the TMS employees performing slag work at the Middletown site. (TR 186, 1006; L18 Exh. 3.)

On or about November 9, 2017, Mr. Huffnagel conducted two meetings with TMS employees, during which he distributed a document that laid out the terms and conditions of employment for individuals who chose to apply to work for Stein at the Middletown Facility. (Jt. Exh. 1, ¶ 16; Jt. Exh. 13; TR 214-15, 286-87.) Mr. Huffnagel read this document out loud to those present, and also informed them that Stein would be accepting job applications for the Middletown site. (Jt. Exh. 1, ¶ 16; TR 214-15.) Mr. Huffnagel also emphasized that employment with Stein was not guaranteed, as applicants would be subjected to a formal application submission (Emp.

Exh. 8; Emp. Exh. 12), an in-person interview, a background check, and a physical examination. (Jt. Exh. 1, ¶ 16; TR 143-44, 287-89, 363-64; 429-30, 469, 571-72, 578, 907, 1196-97.) During the meeting, Mr. Huffnagel indicated that if employees were not already members of Local 18, if hired by Stein, their fringe benefits would no longer emanate from those provided by virtue of their membership in Teamsters Local 100 or Laborers' Local 534. (TR 140-41, 289-90, 433-34, 469-70.) Additionally, by reading from Stein's terms-and-conditions document, Mr. Huffnagel indicated that, if hired, employees not already Local 18 members would not be governed by the same shift differentials, vacations, or probationary periods they currently enjoyed. (TR 141-43, 215, 289-90, 433-34, 469-70, 572-73, 77.) He also fielded numerous questions regarding these changes in job conditions. (TR 215.)

Between November 2017 and the beginning of January 2018, Stein conducted interviews with the TMS employees who had submitted applications for employment at the Middletown Facility. (TR 525-28.) During the interviews, Mr. Huffnagel informed applicants that they would be cross-trained on work that was previously confined to the three separate trades of operating engineer, teamster, or laborer. (TR 588-89, 906-07, 1197-98, 1254.) After Stein completed its interviews on or before the first week of January 2018, it hired 56 of the 71 individuals employed by TMS as of December 31, 2017. (Jt. Exh. 1, ¶¶ 20-22.) Of those 56 employees, 36 – a majority – were individuals who were Local 18 members. (*Id.* at ¶ 22.) In sum, Stein hired a total of 60 individuals to perform scrap work at the Middletown site on or before the first week of January 2018. (*Id.* at ¶ 23.)

Shortly after Stein assumed operations, in early January 2018, Mr. Holvey met with Local 18 officials at the Union's District 3 offices, where he was presented with authorization cards from the Middletown Facility work force for his inspection. (TR 1009-10; L18 Exh. 3.) Upon review of

these documents, the parties confirmed that 34 of the 60 employees Stein hired on January 1, 2018, signed authorization cards indicating that they desired representation by Local 18. (*Id.*) Moreover, each and every one of these authorization cards were signed well before Stein was awarded the contract for slag reclamation work at the Middletown Facility. (TR 186, 1006; L18 Exh. 3.) Based upon this “card-check” process clearly demonstrating that 34 of the 60 individuals Stein hired – a majority – desired to be represented by Local 18, Stein voluntarily recognized Local 18 as the exclusive bargaining representative for all of its employees at the Middletown Facility. This recognition was contractually memorialized in the CBA Local 18 and Stein entered into, which provided that Stein “recognize[s] the Union as the exclusive bargaining representative for all employees within the contractual bargaining unit pursuant to Section 9(a) of the National Labor Relations Act based upon the Union having provided the Company with evidence of its support by a majority of such employees; and [that] the Union and the Company desire to set forth in writing their agreement on rates of pay, hours of work, and other conditions of employment[.]” (Jt. Exh. 16, preamble, § 1.01.) The CBA contained the following classifications: General Laborer, Mechanic Helper, Lancer, Lube Man, Site Laborer/Safety, Truck Driver, General Operator, Crane Operator, B-Mechanic, Hot Pit Operator, A-Mechanic, and Master Mechanic. (*Id.* at § 6.01.)

As Mr. Huffnagel indicated during his November 2017 meeting to TMS employees, Stein began cross-training them during the first week of January 2018. (TR 303-05.) While newly hired employees – formerly employed under TMS and exclusively devoted to operating engineer, teamster, or laborer work – were still performing some of the same tasks they had done for TMS, in light of Stein’s cross-training, they began performing the work of other classifications within the first week of January 2018 and continuing through the spring. (TR 1281-84.) Specifically, multitudes of employees previously only performing: 1) operating engineer work were running

haul trucks to convey slag aggregate and water trucks to keep down dust levels (TR 589, 593, 1290, 1299-1307, 1310-11, 1320-21; L18 Exh. 4); 2) laborer work were operating skid-steers, loaders, backhoes, telehandlers, skid-steers, running plants, and driving haul trucks, parts trucks, and water trucks (TR 367-68, 372, 374-76, 591-93, 844-89, 903, 942-79, 984-95, 1038-53, 1097-1117, 1154-1177; Emp. Exhs. 28-30); and 3) truckdriver work were running backhoes, loaders, and serving as on-site safety attendants. (TR 594, 598, 1291.) Significantly, these employees were performing work that heretofore been segregated by trade; for example, former laborers were operating loaders not only to perform site cleanup, but to also load slag throughout the Middletown Facility. (TR 1000.) Stein further materially modified operations at the Middletown Facility by requiring that all employees record their shifts with the same time clock (TR 1214-15) and moving away from eight-hour shifts running around the clock – as TMS had utilized – to two 12-hour shifts. (TR 1333-35.) And of the four shift supervisors and site superintendents that TMS employed at the Middletown Facility – Willie Huseman, Bob Huseman, Ty Reynolds, J.R. Cement, Nate Prince, and Chad Bear – Stein re-employed only Messrs. Prince and Bear. (TR 228, 293-94.)

Additionally, when Stein commenced operations at the Middletown Facility, it brought in its own heavy equipment to engage in scrap reclamation and processing, including cranes, loaders, and haul trucks. (TR 584.) In that same vein, Stein ceased using certain cranes that TMS had utilized when it had performed scrap work at the Middletown site. (TR 583.) Similarly, upon assuming operations, Stein ensured that all of its employees share the same lunchroom, shower facilities, and locker room. (TR 275-76, 1212-14.) Likewise, all employees, regardless of their classification, participated together in shift-wide monthly safety training meetings. (TR 276-77.) During these meetings, all employees received the same training, such as the safe operation of

overhead cranes and mobile equipment, regardless of their classification. (Emp. Exh. 6; TR 310-12.)

G. The Charging Parties' failure to seek recognition from Stein

Stein's status as the winning bidder for slag work at the Middletown facility was quickly made public knowledge by TMS to its employees. (TR 90-91; 522-23.) Despite this fact, neither Charging Party made a timely demand for recognition prior to Stein assuming operations on January 1, 2018. Rather, Laborers' Local 534 first communicated with Stein through a February 20, 2018, email. (Jt. Exh. 1, ¶ 27; Jt. Exh. 17.) At the time of this initial demand, the CBA between TMS and Laborers' Local 534 that covered the Middletown Facility slag operations had been expired for nearly two months. (See Jt. Exh. 11.) Teamsters Local 100 also failed to make any timely demand for recognition. Indeed, its first demand did not come until January 10, 2018, more than week after Stein assumed operations and more than a week after the expiration of the CBA between Teamsters Local 100 and TMS (Jt. Exh. 1, ¶ 24; Jt. Exh. 14; Jt. Exh. 7.)

**III. Statement of Procedure**

Rather than submit any prompt demand for recognition, the Charging Parties instead elected to file unfair labor practice ("ULP") charges with the Board. The very first ULP charge in this case was filed on or about February 20, 2018. Thereafter, a slew of new and amended charges followed until a formal complaint was issued.<sup>6</sup> In relevant part, the General Counsel alleged that Local 18 violated Section 8(b)(1)(A) of the Act by obtaining recognition and bargaining with Stein, and subsequently entering into a CBA with Stein, even though it did not represent a majority of employees in units formerly represented by the Charging Parties. (Teamsters Comp. at ¶¶ 9, 24;

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<sup>6</sup> The original Consolidated Complaints were served by the Region on April 19, 2018. (GC Exh. 1(i).) The Complaints were subsequently amended and the Region served the same on April 30, 2018. (GC Exh. 1(k).) The Amended Consolidated Complaint pertaining to Charging Party Laborers' Local 534 was subsequently amended for a second time and served on the parties on June 29, 2018.

Laborers Comp. at ¶¶ 9, 22.) The General Counsel further contended that Local 18 violated Section 8(b)(1)(A) of the Act by receiving assistance and support from Stein which allowed the distribution of Local 18's membership application documents to Stein's employees (Teamsters Comp. at ¶¶ 13, 24; Laborers Comp. at ¶¶ 13, 22), and by informing employees in units formerly represented by the Charging Parties that if they failed to sign membership application documents, they would be removed from Stein's work schedule. (Teamsters Comp. at ¶¶ 17-19, 24; Laborers Comp. at ¶¶ 17, 22.) Finally, the General Counsel averred that Local 18 violated Sections 8(b)(1)(A) and 8(b)(2) by accepting dues and other fees from employees under its CBA with Stein even though it was not the lawfully recognized exclusive collective-bargaining representative of those employees. (Teamsters Comp. at ¶¶ 13, 24-25; Laborers Comp. at ¶ 13, 22-23.) These allegations were dependent on the legal prerequisite that Stein was in fact obligated to recognize and bargain with the Charging Parties as a successor employer, and by failing to do so, it was unlawfully recognizing Local 18 as the exclusive collective-bargaining representative of employees that were formerly represented by the Charging Parties.

After the Respondents timely answered the Consolidated Complaints, this matter was set for hearing, and was held over the course of five days: September 12, 2018, September 13, 2018, September 17, 2018, October 22, 2018, and October 23, 2018.

#### **IV. Law and Argument**

Reduced to its core, the General Counsel alleges that Local 18 violated Sections 8(b)(1)(A) and 8(b)(2) of the Act because it engaged in certain conduct that was rendered unlawful by the purported facts that Local 18 did not represent a majority of employees in units formerly represented by the Charging Parties and then subsequently obtained recognition by Stein as their exclusive collective-bargaining representative. However, this theory of liability turns on the

critical condition precedent that Stein was obligated to recognize and bargain with the Charging Parties as a successor employer. In this case, that condition has not been satisfied. Instead, as a matter of well-established, well-reasoned, and controlling precedent, Stein was not – as Board jurisprudence has coined it – a *Burns* successor.

A threshold requirement to a *Burns* successor's bargaining obligation is that the employees at issue were represented by a union that held a collective-bargaining relationship with the predecessor employer under Section 9(a) of the Act. Here, the General Counsel has not met its burden in establishing any such 9(a) relationship between the Charging Parties and Stein's predecessors exist. Even if the General Counsel could meet this burden, no bargaining obligations would have attached until after Stein commenced its operations at the Middletown Facility because it was not a perfectly clear *Burns* successor. Regardless, the timing of any bargaining obligations is irrelevant because Stein was neither a conventional nor perfectly clear *Burns* successor. Here, the Charging Parties units were no longer appropriate after Stein assumed operations at the Middletown Facility, and the only appropriate unit was the wall-to-wall unit established in Local 18's CBA with Stein, in which a majority of employees were represented by Local 18, not the Charging Parties. Thus, as a matter of law, Stein is absolved from bargaining obligations as a *Burns* successor. Given that Stein was not a *Burns* successor, Local 18's receipt of recognition from, and bargaining with Stein and subsequent execution of its CBA with Stein do not violate Sections 8(b)(1)(A) and 8(b)(2) of the Act. The General Counsel's allegations of unlawful assistance Local 18 received from Stein, as well as acceptance of dues from Stein employees, must likewise fall because they are premised on the falsehood that Local 18 was not the lawfully recognized exclusive collective-bargaining representative of those employees. This conclusion is also

bolstered by the fact that Local 18 provided uncoerced majority support to Stein for the appropriate unit via authorization cards.

Finally, Stein did not forfeit its bargaining rights by falling afoul of *Advanced Stretchforming Internatl.*, 323 NLRB 529 (1997), nor evade its duty to bargain over discipline as set forth in *Total Security Mgmt.*, 364 NLRB No. 106 (2016). These cases are only applicable if Stein had any bargaining obligations towards the Charging Parties. But because it does not, and because they are also factually distinguishable, neither of them has any bearing on the General Counsel's theory of liability against Stein in this case.

- A. Stein is neither a conventional nor perfectly clear *Burns* successor because the Charging Parties' relationship with TMS was not predicated on Section 9(a) of the Act, thereby absolving Stein of any obligation to bargain with the Charging Parties.

"The bargaining obligation of a 'successor-employer' derives from both the specific mandate of Sections 8(a)(5) and 9(a) of the Act that an employer must bargain with 'representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,' and from the general acknowledgement that a mere change in ownership does not destroy the presumption of continuing employee support for a certified or voluntarily recognized union." *Sch. Bus Serv., Inc.*, 312 NLRB 1, 3 (1993), *enfd.*, 46 F.3d 1143 (9th Cir. 1995). Section 8(a)(5)'s "contract enforcement mechanisms" exist only "by virtue of the strictly limited 9(a) representative status[.]" *John Deklewa & Sons*, 282 NLRB 1375, 1387 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). Thus, the presumption of continuing employee support exists only with a "full and enforceable 9(a) majority representative status . . . by a certification election or voluntary recognition on the basis of a showing of majority support[.]" *In re Viola Indus.-Elevator Div., Inc.*, 286 NLRB 306, 307 (1987). It thus follows that absent proof of a 9(a) relationship between a predecessor employer and

union, a successor employer has no bargaining obligation under the Act. The General Counsel acknowledges the critical role Section 9(a) status plays in the successorship doctrine, as its Complaint specifically avers that TMS had a 9(a) relationship with the Charging Parties (Teamsters Comp. at ¶ 7; Laborers' Comp. at ¶ 7), thus providing the basis for Stein's purported bargaining obligation to the Charging Parties.

It is axiomatic that collective-bargaining relationships under Section 9(a) of the Act "arise out of a Board certification" or "from voluntary recognition of a majority union." *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 586 (1966). "The Board will find that an employer has voluntarily recognized a union when there is a clear and unequivocal agreement by the employer to recognize the union on proof of majority status, *and* the union's majority status has been demonstrated." *Terracon, Inc.*, 339 NLRB 221, 223 (2003), *enfd. sub nom. Operating Engineers Local 150 v. NLRB*, 361 F.3d 395 (2004). (Emphasis added.) "While the requisite clear and unequivocal agreement to recognize the union may be demonstrated by an employer's express statements granting recognition, the Board additionally has held that an employer's statements or conduct evidencing a 'commitment to enter into negotiations with the union [may constitute] an *implicit* recognition of the union.'" *Id.*, quoting *Nantucket Fish Co.*, 309 NLRB 794, 975 (1992). (Emphasis sic.) Similarly, an employer acknowledges a union's card majority status by "examining and verifying the authorization cards" and then subsequently "consent[ing] to future negotiations after authenticating the cards." *Richmond Toyota, Inc.*, 287 NLRB 130, 131 (1987). *See also Rome Elec. Sys., Inc.*, 349 NLRB 745, 745, fn. 2 (2007), *enfd.*, 286 Fed. Appx. 697 (11th Cir. 2008).

Yet "regardless of the explicit or implicit means through which an employer is alleged to have recognized the union," *Richmond Toyota*, 287 NLRB at 131, the second prong of the voluntary recognition test – demonstrated proof of majority status – is still required because "the

key is the original commitment of the employer to bargain *upon some demonstrable showing of majority.*” *Jerr-Dan Corp.*, 237 NLRB 302, 303 (1978), *enfd.*, 601 F.2d 575 (3d Cir. 1979). (Emphasis added.) In the context of the voluntary recognition test, the General Counsel maintains the “initial burden to show majority status . . . . by establishing that the [employer] voluntarily recognized the Union.” *See Royal Coach Lines, Inc.*, 282 NLRB 1037, 1037, fn. 2 (1987), *enf. denied on factual grounds*, 838 F.2d 47 (2d Cir. 1988).<sup>7</sup> *See also Stoner Rubber Co.*, 123 NLRB 1440, 1445 (1959) (“It is elementary that in a refusal-to-bargain case the General Counsel has the burden of proving the union’s majority”). If and only if the General Counsel has satisfied its initial burden to establish majority, does the respondent employer then bear a subsequent burden “of coming forward with sufficient evidence” to rebut it. *See Contemporary Guidance Servs., Inc.*, 291 NLRB 50, 65 (1988).

Whether Stein had any bargaining obligations under the Act to the Charging Parties – either as a conventional or perfectly clear *Burns* successor – depends on whether TMS had a 9(a) relationship with the Charging Parties via Board-certified election or voluntary recognition. As a threshold matter, the record unambiguously demonstrates that at no point prior to Stein assuming operations did TMS employees ever participate in a Board-conducted election for representation by either Teamsters Local 100 or Laborers’ Local 534. (TR 109, 271-72, 362-63, 500, 564, 764, 1179.) Unsurprisingly, the Charging Parties’ CBAs likewise do not indicate that they ever represented a Board-certified unit. Accordingly, the remaining avenue by which the General Counsel could assert a 9(a) relationship is through voluntary recognition. Here, the General Counsel has not met its “initial burden” in establishing that the Charging Parties held a 9(a)

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<sup>7</sup> On review, the Second Circuit noted that “[w]hen the Board reviewed the ALJ’s decision, it correctly began its analysis by noting that the General Counsel had carried its ‘initial burden’ to show majority status by establishing that the employer had voluntarily recognized the union.” *Royal Coach Lines, Inc.*, 838 F.2d at 55.

relationship with TMS by way of voluntary recognition. This is so because the record clearly establishes that at no point had the Charging Parties ever conducted a card check at the Middletown Facility or otherwise presented TMS or its predecessors with evidence of majority support. (TR 501, 765-66.)<sup>8</sup>

Moreover, there is no evidence that TMS or its predecessors ever made “a clear and unequivocal agreement . . . to recognize the [Charging Parties] on proof of majority status[.]” *Terracon, Inc.*, 339 NLRB at 223. Indeed, the CBAs Teamsters Local 100 had with TMS merely indicate that “[t]he Employer hereby recognizes the Union as the sole and exclusive bargaining agent for the purpose of collective bargaining in regard to wages, hours and other terms and conditions of employment for all truck drivers employed by the Employer at its AK Steel, Middletown, Ohio facility[.]” (Jt. Exh. 3, Art. I; Jt. Exh. 4, Art. I; Jt. Exh. 7, Art. I.) In near identical fashion, the CBAs Laborers’ Local 534 entered into with TMS simply state that TMS “recognizes the Union as the sole and exclusive bargaining agent for the purpose of collective bargaining in regard to wages, hours, and other terms and conditions of employment for all general labor work and clean up[.]” (Jt. Exh. 2, Art. I; Jt. Exh. 6, Art. I.) Nowhere in these CBAs did TMS or its predecessors agree to recognize the Charging Parties upon proof of majority status. The record is likewise absent of any evidence that TMS or its predecessors ever reviewed authorization cards and agreed to negotiate, which would otherwise constitute evidence of an implicit recognition of the Charging Parties. *Richmond Toyota*, 287 NLRB at 131. Even assuming, *arguendo*, that the

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<sup>8</sup> Typically, “where an employer outside the construction industry expressly recognizes a union as the 9(a) representative, the union becomes the 9(a) representative of the unit employees, unless the employer timely produces affirmative evidence of the union’s lack of majority at the time of recognition, i.e., within the [six month] 10(b) period.” *Hayman Elec., Inc.*, 314 NLRB 879, 887, fn. 8 (1994). However, as in the instant matter, where the evidence establishes that the employer “did *not* extend recognition under Sec. 9(a) . . . [the Board] find[s] it unnecessary to pass on . . . [the] contention” that “Sec. 10(b) precludes a challenge to the Respondent’s voluntary grant of 9(a) recognition more than 6 months after that recognition.” *USA Fire Protection*, 358 NLRB 1722, 1722, fn. 4 (2012), *enfd. sub nom. Road Sprinkler Fitters Local 669 v. NLRB*, 637 Fed Appx. 611 (D.C. Cir. 2016).

Charging Parties' history of collective bargaining vis-à-vis the existence of consecutively executed CBAs is alone sufficient to establish an employer's agreement to recognize, the record is still devoid of any evidence of *actual* majority support that the Charging Parties enjoyed in their respective units. Without such evidence, a 9(a) relationship by way of voluntary recognition cannot stand. *Terracon, Inc.*, 339 NLRB at 223.

At bottom, where "there is insufficient evidence of majority status," there is "insufficient evidence of recognition[.]" *Anderson Cupertino*, 333 NLRB 585, 585, fn. 2 (2001).<sup>9</sup> This is so because demonstrated proof of majority status as the "key" to voluntary recognition is missing. *Jerr-Dan Corp.*, 237 NLRB at 303. The General Counsel has failed to meet its burden in establishing proof of majority support for the Charging Parties as voluntarily recognized unions by TMS or its predecessors. Accordingly, there was no "presumption of continuing employee support for [the Charging Parties as the] . . . voluntarily recognized union[s]" because they did not have a 9(a) relationship with TMS. *Sch. Bus Serv., Inc.*, 312 NLRB at 3. Yet because Stein's bargaining obligation to the Charging Parties specifically "derives from" this specific mandate of presumed majority support under Section 9(a), such an obligation cannot attach. *See Id.* Without this bargaining obligation, Local 18's conduct in 1) obtaining recognition from and bargaining with Stein as an exclusive bargaining representative; 2) entering into a CBA with Stein covering employees formerly represented by the Charging Parties; and 3) accepting dues and other fees

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<sup>9</sup> It is "long-recognized that Board-conducted elections provide the most reliable basis for determining whether employees desire representation by a particular union because employees cast their votes 'under laboratory conditions and under the supervision of a Board agent.'" *Whittier Hosp. Med. Ctr. Advice Memo*, NLRB No. 21-CA-36404, p. 3 (Jan. 4, 2005), quoting *Dana Corp.*, 341 NLRB 1283, 1283 (2004). Given that "[t]here are no such guarantees of laboratory conditions or impartiality when voluntary recognition is extended based on some other showing of majority support . . . the Board and the courts have long held employers and unions to a *strict showing of actual majority support* when recognition is granted privately, rather than based on a Board-conducted election." *Id.* (Emphasis added.)

from employees formerly represented by the Charging Parties does not violate Sections 8(b)(1)(A) or 8(b)(2) of the Act.

- B. Even assuming, *arguendo*, that the Charging Parties’ relationship with TMS was predicated on Section 9(a) of the Act, to the extent Stein retained any bargaining obligation towards the Charging Parties, it did not attach until after Stein assumed operations because it was not a perfectly clear *Burns* successor.

“[A] successor is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally.” *E.g., Adams & Assocs., Inc.*, 363 NLRB No. 193 (2016), slip op. at 3, *enfd.*, 871 F.3d 358 (5th Cir. 2017), citing *Burns*, 406 U.S. at 281-295. The successor’s “duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new workforce until after the successor has hired a full complement of employees.” *Id.* However, if it is “perfectly clear . . . that the new employer plans to retain all of the employees in the unit,” it is instead “appropriate to have [the successor] initially consult with the employees’ bargaining representative before [it] fixes terms.” *Burns* at 294-95.

The “perfectly clear” caveat in *Burns* is “restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enfd.*, 529 F.2d 516 (4th Cir. 1975). When an employer “who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms,” the Board reasoned that it cannot “fairly be said that the new employer ‘plans to retain all of the employees in the unit,’” *Id.*,

because “of the possibility that many of the employees will reject employment under the new terms, and therefore the union’s majority status will not continue in the new workforce.” *Adams & Assocs.*, slip op. at 3.

Stein’s conduct at its November 9, 2017 meeting with TMS employees at the Middlefield Facility checks off all the hallmarks required for it to avoid the immediate bargaining obligations of a perfectly clear successor. First, this meeting occurred well before Stein had hired any of TMS’s employees or even began interviewing them for positions. (TR 525-28.) This militates towards a finding that Stein was not a perfectly clear *Burns* successor because it “was in the preliminary stages of its hiring process and had not yet decided which . . . employees it intended to hire.” *Data Monitor Sys.*, 364 NLRB No. 4 (2016), slip op. at 3. During this meeting, Mr. Huffnagel emphasized that employment with Stein was not guaranteed, as applicants would be subjected to a formal application submission (Emp. Exh. 8; Emp. Exh. 12), an in-person interview, a background check, and a physical examination. (Jt. Exh. 1, ¶ 16; TR 143-44, 287-89, 363-64; 429-30, 469, 571-72, 578, 907, 1196-97.) Under these same circumstances, the Board has ruled that an employer was not a perfectly clear *Burns* successor because at a job fair it held prior to taking over operations, it communicated to potential employees that it was “currently accepting applications” and that all candidates must complete all parts of the application process “[t]o be considered for employment.” *Paragon Systems, Inc.*, 364 NLRB No. 75 (2016), slip op. at 2. Since the employer did “not suggest that hiring is inevitable,” but instead offered “an invitation . . . to complete an application,” the employer was not a perfectly clear *Burns* successor. *Id.*, slip op. at 2-3.

Moreover, given that Stein imposed additional requirements beyond just applying; *to wit*, interviewing and being subjected a variety of background checks, “there was nothing about the application packets or [Stein’s] associated conduct that suggested that completing the applications

was simply an administrative formality that would ensure continued employment.” *Data Monitor Sys.*, slip op. at 3. Given that Stein “did not, in any way, communicate or demonstrate an intent to retain the employees, [it] was under no obligation at that point to make a simultaneous announcement of its intent to change terms and conditions of employment in order to avoid ‘perfectly clear’ successor status.” *Id.* Regardless, Stein did make such an announcement at the same November 9 meeting. Specifically, the employees present acknowledged that being accepted for work would mean foregoing fringe benefits provided by virtue of membership in Teamsters Local 100 or Laborers’ Local 534. (TR 140-41, 289-90, 433-34, 469-70.) The employees similarly realized that, if offered a job with Stein after applying, their benefits would be conditioned by shift differentials, vacations, and probationary periods different from those they currently enjoyed. (TR 141-43, 215, 289-90, 433-34, 469-70, 572-73, 77.) At bottom, even if the General Counsel could establish that, despite a lack of a 9(a) relationship between the Charging Parties and TMS, Stein owed certain bargaining obligations to the former group, they did not attach before it fixed any initial terms because Stein was not a perfectly clear *Burns* successor.

C. Any bargaining obligations that Stein might have had as a conventional *Burns* successor do not exist because it was not a *Burns* successor at all.

An employer is a “successor employer, obligated to recognize and bargain with a union representing the predecessor’s employees, when (1) there is a substantial continuity of operations, and (2) a majority of the new employer’s work force, in an appropriate unit, consists of the predecessor’s employees.” *E.g., Allways East Transp., Inc.*, 365 NLRB No. 71 (2017), slip op. at 2, citing *Burns*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). With respect to whether substantial continuity of operations exists, “the following factors . . . [are] relevant to the analysis: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working

conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers.” *Id.*

Determining whether a majority of the new employer’s work force is composed of the “appropriate unit” is “[c]ritical to a finding of successorship[.]” *Banknote Corp. of Am.*, 315 NLRB 1041, 1043 (1994), *enfd.*, 84 F.3d 637 (2d Cir. 1996). As to the propriety of the new employer’s work force, it is a long-standing Board principle, following the Supreme Court’s guidance in *Burns*, that all successorship cases “are predicated on the finding that the predecessor’s bargaining unit remained intact under the successor and continued to be an appropriate unit.” *Border Steel Rolling Mills, Inc.*, 204 NLRB 814, 821 (1973). In the case *sub judice*, Stein cannot be considered a *Burns* successor because the Charging Parties’ units were not the appropriate units under Stein’s operations. Instead, under the *Border Steel Rolling Mills* test, as adhered to by subsequent Board precedent, the bargaining unit memorialized in the CBA between Local 18 and Stein constituted the appropriate unit for successor analysis. Thus, because a majority of the employees in that unit were not represented by the Charging Parties, there was insufficient continuity to trigger Stein’s bargaining obligation under *Burns*.

*i. The Charging Parties’ units were no longer appropriate after Stein assumed operations at the Middletown Facility.*

Determining “whether the bargaining unit remained appropriate under the successor . . . turns on evidence showing whether the successor employer has introduced structural or operational changes which affect the employees’ common interests.” *United States Can Co.*, 305 NLRB 1127, 1139 (1992), *enfd.*, 984 F.2d 864 (7th Cir. 1993). In other words, “[a] determination must . . . be made as to the integrity of the . . . bargaining unit” with which the new employer allegedly has an obligation to bargain “after” the new employer commences operations. *Border Steel Rolling Mills, Inc.*, 204 NLRB at 822. In *Border Steel Rolling Mills*, the truck maintenance unit which the General

Counsel contended the new employer had an obligation to bargain with continued to perform such work after the employer commenced operations, but “their duties were expanded by [the employer] and to a meaningful degree their jobs were functionally integrated with the other employees” performing the employer’s services. *Id.* They “share[d] certain common equipment” and a “common storehouse,” “work[ed] jointly on occasions” with other employees. *Id.* at 822. Moreover, the maintenance employees were subjected to “common” labor policy and supervision. *Id.* While the maintenance employees’ “primary function” included some “highly skilled work,” there was enough evidence to demonstrate that after commencing operations, the new employer made that unit “an integrated part of . . . [its] overall operation[.]” *Id.* As such, the predecessor’s maintenance unit “did not survive” the commencement of operations by the new employer, and the employer did not violate the Act by refusing to recognize and bargain with the union that claimed to represent it. *Id.*

In this case, Stein has implemented sufficient “structural or operational changes which affect the employees’ common interests,” *see United States Can Co.*, 305 NLRB at 1139, at the Middletown Facility such that the Charging Parties’ units under TMS are no longer the appropriate units through which Stein’s bargaining obligations should be assessed. Even before Stein assumed operations at the Middletown Facility, it sent its area manager, Doug Huffnagel, to evaluate the manner in which TMS operated there to assess what operational changes might be necessary. Mr. Huffnagel observed that there were numerous inefficiencies in the way employees, as Balkanized in their three trades, operated at the Facility. (TR 1193-94.) Accordingly, Stein prepared to cross-train its employees in order to minimize downtime and ensure that the Facility ran as smoothly as possible. To this end, Stein’s employees acknowledged that upon interviewing for work, they were

informed that they would be cross-trained on operations they had not previously done while working at TMS. (TR 588-89, 906-07, 1197-98, 1254.)

Similarly, upon commencing work on January 1, 2018, Stein employees immediately began receiving cross-training and shortly thereafter began performing work in all aspects of Stein's slag operations, regardless of whether they were previously limited to operating engineer, teamster, or laborer work. Stein employees Troy Neace, Ova Venters, Timothy Willhoite, Michael Young, and Christopher Michael were all previously employed by TMS at the Middletown Facility. These individuals performed laborer work for TMS, and none of them ever utilized heavy equipment or haul trucks. (TR 901, 920-21, 932-40, 1030-1036, 1089-94, 1147-53, 1162-63.)

Mr. Neace received cross-training on slag processing plants within the first two months of Stein assuming operations, and began operating the plants during this same time period. (TR 374-76, 379.) Between February and March 2018, Mr. Neace ran slag processing plants for the majority of 16 separate shifts. (TR 1158-66, 1171-75, 1177; Emp. Exhs. 29-30, pp. 1372, 1378, 1381, 1385, 1409, 1412, 1415, 1422, 1437, 1443, 1461, 1468, 1471, 1477, 1497, 1502.) Starting in January 2018, Mr. Neace also received cross-training and began operating a parts truck, backhoe, man lift, parts truck, and water truck for the majority of at least 11 shifts through March 2018. (TR 1154-58, 1166-72, 1175-77; Emp. Exhs. 28-30, pp. 1343-44, 1358, 1423-24, 1428, 1431, 1441, 1486, 1492.)

Mr. Venters received cross-training, and subsequently started working on a variety of heavy equipment in January of 2018. Specifically, he spent the majority of his shifts operating a skid-steer, backhoe, and telehandler on five separate dates in January 2018. (TR 844-850; Emp. Exh. 28, pp. 1304, 1326, 1329, 1332, 1334.) Throughout February 2018, Mr. Venters operated a backhoe, skid-steer, and parts truck no less than 15 dates for the majority of his shifts. (TR 854-

69; Emp. Exh. 29, pp. 1356, 1363, 1366, 1369, 1374, 1379, 1380, 1386, 1390, 1392, 1400, 1404, 1408, 1411, 1413.) And during the month of March 2018, Mr. Venters ran a backhoe, water truck, and haul truck at least 15 separate times during the majority of his shifts. (TR 871-889; Emp. Exh. 30, pp. 1414, 1418, 1425, 1429, 1432, 1447, 1447, 1452, 1457, 1462, 1476, 1479, 1482, 1486, 1493, 1501.)

Mr. Willhoite also received cross-training in January 2018 for a variety of different equipment. On six different occasions in January and February 2018, he operated a telehandler, skid steer, backhoe, loader, and parts truck for the majority of his shifts. (TR 942-52; Emp. Exhs. 28-29, pp. 1314, 1323, 1394, 1396, 1406, 1410.) And in March 2018, Mr. Willhoite operated a portable plant, backhoe, telehandler and skid-steer on 14 separate occasions for the majority of his shifts. (TR 953-76; Emp. Exh. 30, pp. 1416, 1419-20, 1426, 1430, 1433, 1448, 1453, 1458, 1463, 1473, 1490, 1494, 1498.)

For his part, Mr. Young was cross-trained on haul truck operations in the spring of 2018, and on no less than 13 occasions in March 2018, he ran a haul truck for the majority of his shifts. (TR 1040-52; Emp. Exh. 30, pp. 1427, 1434, 1442, 1459, 1466, 1469, 1480, 1483, 1495, 1499, 1500, 1504-05.)

Receiving cross-training in January 2018, Mr. Michael became a versatile employee who operated a skid-steer and backhoe on at least 13 occasions during the majority of his shifts in January 2018 and February 2018. (TR 1097-1108; Emp. Exhs. 28-29, pp. 1310, 1312, 1318, 1320-22, 1324, 1327, 1330, 1345-46, 1383-84.) In March 2018, Stein expanded Mr. Michael's cross-training, and continued to operate backhoes and skid-steers, but also began operating telehandlers and haul trucks on at least six dates during the majority of his shifts in March 2018. (TR 1108-17; Emp. Exh. 30, pp. 1445, 1450, 1460, 1465, 1467, 1470.)

Stein additionally cross-trained a number of operating engineers and truckdrivers. Stein employee Michael Lane observed numerous employees throughout January 2018 being cross-trained on work they previously had not performed for TMS. Specifically, Mr. Lane observed laborers operating skid-steers, water trucks, and haul trucks, and operating engineers running haul trucks. (TR 589, 591-93.) Indeed, Mr. Lane himself trained three separate employees on water truck and haul truck operations. (TR 595-96, 599-602; Emp. Exhs. 13, 15, 16.) Moreover, Stein employee Mike Kingery, previously employed by TMS at the Middletown Facility as an operating engineer, received cross-training and began running haul trucks to transfer slag in March 2018 no less than eight times during the majority of his shifts. (TR 1300-07; L18 Exh. 4, pp. 1436, 1440, 1449, 1454, 1484, 1487, 1491.) On March 23, 2018, Mr. Kingery hauled 26 different loads of material alone. (TR 1310-11, L18 Exh. 4, 1484.) While at TMS, Mr. Kingery operated a loader and other heavy equipment, but never engaged in truckdriver activities. (TR 1296-97, 1320-21.)

The foregoing evidence demonstrates: 1) increased “[i]nteraction and transfers between the employees” that the General Counsel alleges are appropriate units (employees formerly represented by the Charging Parties) and the new employer’s remaining work force; 2) proof that Stein “began training” both groups of employees “together”; and 3) that employees previously categorized as laborers and truckdrivers “began to perform . . . work . . . that had previously been done” by employees in the latter group[.]” *Joe B. Foods, Inc.*, 296 NLRB 950, 950 (1989), *enfd.*, 953 F.2d 287 (7th Cir. 1992). Moreover, employees “in both the predecessor’s unit and the employer’s remaining work force had “significant interchange through other means,” *Id.*, such as working in adjacent areas, sharing break and lunch areas, utilizing the same parking area, common entrances, and locker rooms. (TR 275-76, 1212-14.) Under these circumstances, Stein’s conduct renders the predecessor units of laborers and truckdrivers “inappropriate under the successor,” *Id.*,

citing *Indianapolis Mack Sales*, 288 NLRB 1123 (1988). Given that the General Counsel’s alleged unit was “inappropriate . . . [Stein] did not violate Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the [Charging Parties] on behalf of a separate . . . unit[.]” *Indianapolis Mack Sales* at 1127.

- ii. *When Stein assumed operations at the Middletown Facility, under the single unit established by Stein, a majority of employees were no longer represented by the Charging Parties.*

Where “a majority of [the successor’s] work force who were hired . . . had previously been employed by [the predecessor], but “a majority of those people had not in fact, been represented by [the charging party union],” there can be “no continuity of representation when these [successor] employees, even those who had previously been employed by [the predecessor], went from [the predecessor] to [the successor].” *R&S Waste Servs., LLC*, 362 NLRB No. 61 (2015), slip op. at 31-32, *enfd.*, 651 Fed. Appx. 34 (2d Cir. 2016). As such, the successor is not “a successor within the meaning of *Burns*[.]” *Id.*

As established *supra*, the Charging Parties’ units were not appropriate for determining whether Stein had any bargaining obligations to them. Thus, under *R&S Waste Servs.*, the only remaining calculus is whether Stein had any obligation to bargain with the Charging Parties because the employees they formerly represented constituted the majority of Stein’s entire work force. If anything, the Charging Parties’ relationship with TMS resembled 8(f) collective-bargaining relationships between unions and predecessor employers because it is only in the 9(a) context that “the union’s contract with the predecessor employer create[s] a valid presumption of continuing majority which carrie[s] over to the successor employer.” *Davenport Insulation, Inc.*, 184 NLRB 908, 908 (1970). In *Davenport Insulation*, a predecessor employer was signatory to an 8(f) agreement with the Carpenters. *Id.* However, the successor employer refused to bargain with

the Carpenters during the life of the contract after assuming control of its predecessor's operations. *Id.* at 910. Accused by the General Counsel of violating Section 8(a)(5), the Board ultimately concluded that the employer did not fall afoul of the Act. Specifically, it held "that where, as here, a contract with the predecessor employer has been entered into pursuant to Section 8(f), no duty is imposed upon the successor employer to honor its predecessor's bargaining obligation unless there is *independent proof of the union's actual majority* and of the successor employer's unlawful refusal to bargain." *Id.* at 908. (Emphasis added.) Because "the uncontroverted evidence in [that] case reveal[ed] that the [Union] at no time represented a majority of employees employed by [the successor employer]," the Board could "not require [the successor employer] to bargain with the Union or to assume and be bound by the contract between [the Union] and the [predecessor employer]." *Id.*

Here, neither Teamsters Local 100 nor Laborers' Local 534 would have "represented a majority of employees employed by" successor Stein. *Davenport Insulation*, 184 NLRB at 908. Instead, of all the former TMS employees Stein retained upon assuming operations, 36 were Local 18 members, 8 were Teamsters Local 100 members, and 11 were Laborers' Local 534 members. (TR 1009-10; L18 Exh. 3; Jt. Exh. 1, ¶ 23.) Indeed, throughout 2017, of the 71 total individuals employed by TMS, 42 – a majority – were represented by Local 18. (Jt. Exh. 1, ¶¶ 17-29.) Local 18 thus represented a majority of Stein's employees within the appropriate wall-to-wall bargaining unit when Stein first put out a bid for the Middletown Facility, continuing to when Local 18 and Stein first started negotiating for a CBA in October of 2017, and leading up to January of 2018, when a majority of the employees retained were represented by Local 18 through uncoerced majority support. The Union provided confirmation of uncoerced majority support in October 2017 when it represented to Stein that it represented a majority of the employees performing work at the

Middletown site, by and through authorization cards, signed no later than August 2017 (TR 186, 1006; L18 Exh. 3), and later presented said authorization cards to Stein for its inspection and approval in early January 2018. (TR 1009-10; L18 Exh. 3.) Accordingly, Stein was not obligated to bargain with either of the Charging Parties *nor* assume and be bound by their CBAs with TMS, and therefore it did not violate Section 8(a)(5) of the Act. *Davenport Insulation* at 908.

D. Stein maintained its right to withhold bargaining as a non-Burns successor after its November 9, 2017 meeting with TMS employees because it had not forfeited its rights to set initial terms and conditions of employment under *Advanced Stretchforming Internatl.*

At the hearing, the General Counsel indicated that it intended to pursue the contention, albeit not alleged in its Complaint, that any right Stein retained in unilaterally implementing initial terms and conditions of employment at the Middletown Facility had been forfeited because its statement at the November 9, 2017 meeting that employment would be conditioned on joining Local 18 ran afoul of *Advanced Stretchforming Internatl.*, 323 NLRB 529 (1997), *enfd. in rel. part*, 233 F.3d 1176 (9th Cir. 2000). This result does not obtain. In *Advanced Stretchforming Internatl.*, the Board held that where an employer declares “at the outset that there would be no union at its facility,” the employer, “like a successor that discriminatorily refuses to hire a majority of its predecessor’s employees in order to avoid recognizing and bargaining with a union, forfeited its *Burns* right to set initial terms and conditions of employment without first bargaining with the Union.” *Id.* at 530. This holding was based out of the equitable doctrine that “the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees’ collective-bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.” *Id.* A successor cannot “‘indicate[] to the applicants that it intends to discriminate against [the predecessor’s] employees to ensure its nonunion status,’” when, “prior to making its hiring

decisions, a successor employer does not know whether it will have a duty to recognize and bargain because it does not know whether it will hire a majority of the predecessor's employees." *Eldorado, Inc.*, 335 NLRB 952, 953 (2001), quoting *Kessel Food Markets, Inc.*, 287 NLRB 426, 429 (1987), *enfd.*, 868 F.2d 881 (6th Cir. 1989).

However, if the successor employer "had no obligation to recognize and bargain with the Union" in the first instance, any such statements that might otherwise run afoul of *Advanced Stretchforming* do not rise to the level of "impliedly threaten[ing] its predecessors' employees[.]" *Eastern Essential Servs., Inc.*, 363 NLRB No. 176 (2016), slip op. at 11. As established *supra*, Stein had no obligation to bargain with the Charging Parties as a *Burns* successor because: 1) the Charging Parties' relationship with TMS was not predicated on Section 9(a) of the Act; 2) the Charging Parties' units were no longer appropriate upon Stein's assumption of operations at the Middletown Facility; and 3) a majority of Stein's entire work force at the Middletown Facility was not represented by the Charging Parties, but instead represented by Local 18. Since Stein lacked an obligation to recognize and bargain with the Charging Parties, any comments it made to TMS employees about joining Local 18 as a condition of employment with Stein do not violate the *Advanced Stretchforming Internatl.* rule. *Id.* Moreover, that case is distinguishable on the narrowness of its holding. That is, *Advanced Stretchforming Internatl.* stands for the proposition that a successor forfeits its "right to set its own initial employment terms and to do so unilaterally . . . if [it] tells prospective employees that it will operate nonunion." *Smoke House Restaurant, Inc.*, 365 NLRB No. 166 (2017), fn. 12, slip op. at 2. Here, there is no evidence, let alone allegation by the General Counsel, that Stein ever threatened the employees present at the November 9 meeting that being hired was conditioned upon a non-union workplace. As such, *Advanced Stretchforming Internatl.* is inapplicable to the case *sub judice*.

- E. Stein was under no obligation to notify and bargain with Charging Party Laborers' Local 534 when it discharged employee Ken Karoly.

The General Counsel alleges that Stein violated Sections 8(a)(1) and 8(a)(5) by failing to notify and bargain with Charging Party Laborers' Local 534 terminated employee Ken Karoly, pursuant to *Total Security Mgmt.*, 364 NLRB No. 106 (2016). (See TR 52.) In *Total Security Mgmt.*, “[t]he primary question before [the Board] is whether an employer has a duty to bargain before disciplining individual employees, when the employer does not alter broad, preexisting standards of conduct but exercises discretion over whether and how to discipline individuals.” 364 NLRB No. 106 (2016), slip op. at 1. Such a question typically arises “after the employees voted to be represented by a union, but before the employer and union had entered into a complete collective-bargaining agreement or other agreement governing discipline.” *Id.* Thus, the Board held that “an employer must provide its employees’ bargaining representative notice and the opportunity to bargain before exercising its discretion to impose certain discipline on individual employees, *absent an agreement with the union providing for a process*, such as a grievance-arbitration system, to address such disputes.” *Id.* (Emphasis added.) Given the precise holding issued *Total Security Mgmt.*, it is inapplicable to the present matter.

The General Counsel’s argument is premised on the assumption that Laborers’ Local 534 represents a unit appropriate for bargaining with Stein as a *Burns* successor. Under this scenario, the employees in that unit would be represented by the Charging Party who not has entered into a CBA with Stein. However, as explained thoroughly *supra*, no *Burns* successor bargaining obligations attached to Stein vis-à-vis its relationship with the Charging Parties. Instead, the only appropriate unit with which Stein was obligated to bargain was the unit described in the CBA it negotiated with Local 18 when it assumed operations on January 1, 2018. (See Jt. Exh. 16.) Mr. Karoly was a member of this unit, employed in the “General Laborer” classification. (TR 400-01;

Jt. Exh. 16, Sec. 8.01.) Under these circumstances, Stein was only obligated to bargain with *Local 18* prior to disciplining Mr. Karoly *if and only if* Stein and Local 18 lacked “an agreement . . . providing for a process, such as a grievance-arbitration system, to address such disputes.” *Total Security Mgmt.*, 364 NLRB No. 106, slip op. at 1. At the time of Mr. Karoly’s discharge, the parties had already executed a CBA which contains a “grievance-arbitration system.” Specifically, Section 6 is entitled “Adjustment of Grievances” and provides that “[s]hould differences arise between [Stein], and [Local 18] or between [Stein], and any of its employees as to the interpretation, and application of the provisions of this Agreement . . . an earnest effort shall be made to settle such differences through the grievance procedure hereinafter specified.” (Jt. Exh. 16, Sec. 6.01.) Section 6 further details the three-step resolution process, leading to final and binding arbitration, if necessary. (*Id.* at Secs. 6.02 – 6.06.) Moreover, Section 7 of the CBA, which delineates Stein’s authority in meting out discipline in the form of suspension or discharge, expressly provides that if its “suspension is affirmed, modified, extended or converted into a discharge,” the employee “may filed a grievance” and pursue it to arbitration, if necessary, “as provided for in Section 6[.]” *Id.* at Secs. 7.03 – 7.04. Accordingly, *Total Security Mgmt.* is distinguishable on its face, and Stein’s discharge of Mr. Karoly did not violate Sections 8(a)(1) and 8(a)(5) of the Act.

Finally, on a procedural level, the General Counsel’s pursuit of *Total Security Mgmt.* allegations is inappropriate in light of its Division of Operations-Management Memorandum OM 17-14, *Case Processing Guidelines for Cases Arising Under Total Security Management*, 364 NLRB No. 106 (Aug. 26, 2016) (Feb. 14, 2017). Therein, the General Counsel acknowledged that the *Total Security Mgmt.* Board permitted a respondent employer to “raise as an affirmative defense in a compliance proceeding that the discipline was ‘for cause,’ as that term is used in

Section 10(c) of the Act, and therefore that reinstatement and backpay are not warranted.” Memorandum OM 17-14, p. 1. Given this unique procedural circumstance, the General Counsel stated that “litigating the issue of a make whole remedy in cases arising under *Total Security* requires the consideration of facts that occurred prior to the actual imposition of discipline – *a necessary element of establishing a violation.*” *Id.* at p. 2. (Emphasis added.) It thus acknowledged that “[w]aiting until after the issuance of a Board order to initiate compliance proceedings to litigate the make whole remedy unduly prolongs the compliance process.” *Id.* To remedy undue delay, the General Counsel concluded that Regions “should consolidate the compliance proceeding with the underlying unfair labor practice proceeding, and issue a consolidated complaint and compliance specification proceeding in these cases[.]” *Id.* In this case, the Region issued no such “consolidated complaint and compliance specification.” Thus, by continuing to prosecute this 8(a)(5) allegation, the General Counsel is ignoring its own policy of “expedit[ing] the processing of these cases” and sanctioning Region 9’s failure to abide by the General Counsel’s “[b]asic action requirements” provided for in Memorandum OM 17-14. *Id.*

F. Local 18 did not unlawfully obtain recognition from, and bargain with, Stein because it provided Stein with conclusive proof of uncoerced majority support of its employees at the Middletown Facility.

Where authorization cards are “not tainted” with employer assistance, if they demonstrate majority support for a union, that union “represent[s] an uncoerced majority of the employees on [the date] when [the employer] extend[s] 9(a) recognition to the [union.]” *Garner/Morrison, LLC*, 366 NLRB No. 184 (2018), slip op. at 4. In the instant matter, when Stein extended 9(a) recognition to Local 18, the record evidence demonstrates that the Union represented an uncoerced majority of its employees. Stein’s conduct was predicated on its inspection of Local 18’s authorization cards from the Middletown Facility. (TR 1009-10; L18 Exh. 3.) These cards were signed by Stein

employees and dated no later than August 2017. (TR 186, 1006; L18 Exh. 3.) These cards were thus procured well in advance of any coercive conduct averred by the General Counsel; *to wit*, that Local 18 allegedly: 1) told non-members in *January and February 2018* that if they failed to sign membership applications and check-off authorizations on behalf of Local 18, they would be removed from the work schedule (Teamsters Comp. at ¶¶ 18-19)<sup>10</sup>; and 2) received assistance and support from Stein which allowed the distribution of Local 18’s membership applications and check-off authorizations to non-members. (Teamsters Comp. at ¶ 17; Laborers Comp. at ¶ 17.) Under these circumstances, because there is “no evidence whatsoever to indicate that the [employer] gave any assistance to [the union] in this respect or that the Union resorted to any coercive tactics in obtaining the same,” Local 18 “did in fact represent a majority of the employees” that was uncoerced at the time it presented its authorization cards to Stein. *Roegelien Provision Co.*, 99 NLRB 830, 842 (1952). As such, Section 8(a)(2) and 8(b)(1)(A) charges are dismissed. *Garner/Morrison, LLC*, slip op. at 4.

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<sup>10</sup> Stein employee Gary Wise claimed that he met Local 18 official Justin Gabbard at an unidentified date shortly after January 1, 2018, at the Union’s District 3 Union Hall, where he had arrived to complete his membership paperwork. (TR 534-35.) Mr. Wise subsequently contended that during this time, Mr. Gabbard informed him that if he failed timely to fill out the paperwork “they’ll take you off the schedule and make you leave the site.” (TR 537.) There was no further testimony elicited to clarify who “they” referred to, or to otherwise corroborate Mr. Wise’s testimony. In any event, even if Mr. Wise was referring to Stein, this cannot constitute a threat from Local 18. If anything, Mr. Gabbard was simply passing on information he had heard. Tellingly, the General Counsel did not put Mr. Gabbard on the stand to clarify this hearsay testimony. As rebuttal, Richard Dalton, Local 18’s Business Manager (TR 681), stated that Local 18 has never threatened an employee with loss of work if the employee failed to complete requisite membership paperwork and become a dues-paying member within the 30-day period of the CBA’s union security clause. (TR 700-01; *See* Jt. Exh. 16, Sec. 5.01.) Moreover, Mr. Dalton made clear that Local 18 has no power to make such threats or exercise any such scheduling discretion. (*Id.*) And both on direct- and cross-examination, Mr. Dalton emphasized that following Stein’s assumption of work at the Middletown Facility, Local 18 was attempting to ease the membership process as much as possible for new members by relaxing enforcement of the 30-day union security clause. (TR 712, 722-23.)

**V. Conclusion**

For all the foregoing reasons, Local 18 respectfully requests that Administrative Law Judge Gollin dismiss the General Counsel's Complaint.

Respectfully Submitted,

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